

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ROBERT MCQUEEN,

Defendant-Appellant.

---

UNPUBLISHED

August 23, 2005

No. 252871

Kent Circuit Court

LC No. 03-001780-FC

Before: Zahra, P.J., and Cavanagh and Owens, JJ

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of criminal sexual conduct in the first degree (CSC I), the victim being under age thirteen, MCL 750.520b(1)(a), and one count of criminal sexual conduct in the second degree (CSC II), the victim being under age thirteen, MCL 750.520c(1)(a). Defendant was sentenced to prison terms of eleven to forty years for CSC I and ten to fifteen years for CSC II, all to be served concurrently. Defendant appeals as of right, and we affirm.

Defendant argues that his right to due process was violated by an amended information that listed a new charge on which he never was arraigned. Further, he asserts that his counsel's failure to object to the information constituted ineffective assistance of counsel. We disagree.

Defendant was bound over, as charged, on two counts of CSC I involving a person under thirteen years of age and one count of CSC II involving a person under thirteen years of age. During the preliminary examination, complainant indicated that she was thirteen years old the last time the defendant had penetrated her. Defense counsel pointed this out, at which point the prosecutor indicated that an amendment would be sought in circuit court to add a count based on the child being between the ages of thirteen and sixteen. The district court declined the prosecutor's invitation to allow an amendment at that point, stating that it would allow the circuit court to make the decision.

Eventually, the prosecutor filed an amended information adding the charge.<sup>1</sup> The prosecutor did not first seek the trial court's permission. However, defendant never objected to the information, which precludes this Court from affording defendant relief. See MCL 767.76.

Regardless, we find no basis for affording relief. Citing *People v Hunt*, 442 Mich 359; 501 NW2d 151 (1993), defendant asserts that while an information can be amended to correct any defect, imperfection, or omission in form or substance before, during or after trial, the addition of a new charge is not allowed unless there was sufficient evidence to have supported a bindover and the defendant is not prejudiced. In this case, there was sufficient evidence at the preliminary examination to support a bindover because complainant testified that defendant penetrated her after she turned thirteen. Moreover, defendant was the party who expressly brought the problem with the information to the district court's attention; he did not have any surprise, notice or opportunity to defend problems and thus, we find no evidence of "unfair surprise, inadequate notice, or an insufficient opportunity to defend against the accusations." *Hunt, supra*; see also *People v Apgar*, 264 Mich App 321, 327-328; 690 NW2d 312 (2004).

Regarding the ineffective assistance of counsel claim, we note that had the prosecutor moved to amend, there is nothing to indicate that an amendment would have been denied. It may have been because of futility that defense counsel did not object. Since the outcome would not have been changed had counsel objected, there is no basis for a finding that counsel's performance was below an objective standard of reasonableness. See *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant also argues that his counsel provided ineffective assistance by not objecting, on hearsay grounds, to the testimony of eight witnesses regarding what the complainant had told them about being sexually abused. There was no evidentiary hearing at which the tactical decision for not objecting might have been explored; thus, our review is limited to the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Defendant maintained that complainant had fabricated the accusations. During his closing, defense counsel pointed out inconsistencies in complainant's own testimony as well as inconsistencies in what she told some of the other witnesses. He noted that complainant had given inconsistent information to others about the number of times the sexual assaults had occurred and when, and had originally told a friend that someone besides defendant was the perpetrator. It appears that defense counsel may have consciously chosen not to object so that inconsistencies in versions told to various people could be brought out. Even if one would have approached the trial differently, it cannot be said that such a strategy was unsound. We do not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843

---

<sup>1</sup> In the charge to the jury, the trial court did not differentiate between the first-degree CSC charges based on the under thirteen and thirteen to sixteen years of age distinction. Instead, the court indicated that penetration with a child fifteen or younger would constitute CSC I. There were no objections to the instructions, and we note that the verdict and sentence also make no distinction between the forms of CSC I charged. We further note that defendant does not raise any issue with regard to these matters.

(1999). Accordingly, defendant has failed to establish ineffective assistance. See *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Affirmed.

/s/ Brian K. Zahra  
/s/ Mark J. Cavanagh  
/s/ Donald S. Owens